BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEANN SUMPTER	)	
Claimant	)	
	)	
VS.	)	
	)	
CHASE CO. HEALTH & REHAB CENTER	)	
Respondent	)	Docket No. 264,526
	)	
AND	)	
	)	
AMERICAN HOME ASSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the July 23, 2004 Award by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on November 2, 2004.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Stephen P. Doherty, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties stipulated that neither disputes the 12 percent functional impairment awarded by the ALJ.

ISSUES

The ALJ awarded claimant a work disability based upon a 39 percent wage loss, which reflects an imputed wage of $195.27 per week, and a 25.50 percent task loss. When averaged, this resulted in an award for 32.25 percent permanent partial disability.

The respondent requests review of this decision alleging that the ALJ's analysis of claimant's wage loss component is erroneous. Respondent maintains the ALJ correctly concluded claimant voluntarily left its employ for reasons other than her injury,

nevertheless they maintain the ALJ should have imputed the wage available to claimant as a full time activities director in a nursing home rather than the part-time wage she was receiving at the time she left respondent's employ. If the full-time wage was used, claimant's wage loss would be non-existent and her recovery would be limited to her functional impairment of 12 percent.

Claimant contends the ALJ's Award should be affirmed in all respects, but in the alternative at oral argument suggested that the wage loss and task loss figures be modified and increased to reflect 44.4 percent task loss and 48.6 percent wage loss, thus yielding a work disability of 46.5 percent.

Thus, the only issues to be address are the nature and extent of claimant's impairment, specifically her alleged work disability under K.S.A. 44-510e(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Following her compensable injury and after receiving treatment and permanent restrictions, claimant was offered an opportunity to retrain and reeducate herself for the job as activity director at the respondent's nursing home facility. This position was new to claimant and reflected her inability to return to her former position as a CNA following her February 15, 2001 compensable injury, which forms the subject of this claim.

Claimant began her job as activity director for the facility and was earning a wage in excess of that paid to her before her injury. Unfortunately, the census of the facility dropped, and as a result, claimant's hours were reduced in late March or early April 2002. It was respondent's policy to cut hours from the supervisory staff until such time as the census improved. In the case of claimant as well as the social services director, this meant that the two of them each would be working part-time, approximately 23 hours per week. There is some suggestion in the file that claimant was offered the opportunity to work in the medical records department to make up for the loss of hours, but it is unclear if she ever actually did that job, how much she would have been allowed to work and what that job would have paid had she actually done that job.

Claimant was then terminated from her job as of June 1, 2002, although the circumstances surrounding that event are in dispute. Claimant alleges she and her co-worker Phyllis Nurenberg, the social services director, were asked to engage in a "contest" of sorts. The two were given goals at a meeting in mid-May 2002 and claimant understood that whoever did the best at achieving those goals would be given the combined full-time job of activity director/social services director. This was apparently intended to address the issue of low census in the facility as the result would be one full-time person rather than

two. Other than claimant's testimony, the only testimony to substantiate claimant's belief is the vague recollection by Ada Hill that she had heard "rumors" about combining these two jobs.[1]

There is no dispute that a meeting was held in mid-May and that claimant, Ms. Nurenberg, Geri Heckart and Dawn Reuter were in attendance. There is likewise no dispute that claimant and Ms. Nurenberg were given a sheet of goals to which she responded in writing. According to Dawn Reuter, the goal was to have claimant and Ms. Nurenberg job share the two positions and once the census increased, then each employee would again be working full-time. In fact, one of the goals given to claimant was to recruit residents to the facility and that effort would have helped to increase the census.

Geri Heckart's testimony echoes that of Ms. Reuter's. There was no plan to merge the two positions. Rather, the goal was to increase the census and return claimant's hours to full time. In the meantime, she could have worked in the medical records department. Ms. Heckart went on to testify that claimant came in to the facility on May 27, 2002, and announced that she was "here to be fired."[2] Ms. Heckart told her she wasn't going to get fired and told her to come back the next working day, which claimant did. On that day, claimant left her badge and other items for Ms. Heckart and did not return until June 6, 2002, when she picked up her last check. It is respondent's position that claimant abandoned her job while claimant contends she was fired.

Immediately upon leaving her job with respondent in June 2002, claimant sought employment through a friend who worked at the local Casey's, a convenience store. Claimant was employed to work for $6.75 an hour, working as many hours as they will assign to her. When co-workers are on vacation, she gets more hours. Conversely, when everyone else is working, her hours go down. At the time of the regular hearing she was earning $7.00 per hour. She does not believe this job will provide her with full-time hours, nor is she apparently making any significant effort to find full-time employment. Claimant has contacted a few nursing homes to see if the position of activity director is available and to date, has found no such position. Claimant does not currently hold a driver's license although, there is no reason she cannot do so.

Mr. Jim Molski testified that there is no reason claimant could not work full-time and that she has the capacity to earn $270 per week based upon a full-time schedule at Casey's.[3] Mary Titterington, respondent's vocational specialist, testified claimant had the

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[1] Hill Depo. at 11.

[2] Heckart Depo. at 14.

[3] This figure is based upon claimant's wage at the time of her interview with Mr. Molski. She subsequently received a raise to $7 per hour.

capacity to earn anywhere from $6.50 to $9.00 an hour on a full-time basis working as an assistant store manager, fast food worker or bus driver.

Dr. Pedro Murati examined claimant as well as Mr. Molski's task loss report and opined that claimant sustained a 44.4 percent task loss. He expressed this opinion following a review of the record, which had been made available to him in advance of the deposition. In contrast, Dr. Lynn Ketchum testified that claimant's task loss is anywhere from 26 percent (based upon Mr. Molski's list) to 30 percent (based upon Mary Titterington's list).

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.[4] In *Foulk,* the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the fact finder must determine an appropriate post-injury wage based on all the evidence before it.

The ALJ's Award specifically recognized these principles and concluded claimant "voluntarily departed the accommodated position" as activity director for reasons other than

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

her injury.[5] Thus, he imputed the wage as the activity director which she was earning at the time she last worked for respondent. That figure, $195.27 (which reflects the decrease in her hours) translated into a 39 percent wage loss. The ALJ also concluded claimant sustained a task loss of 25.5 percent by using the physicians' opinions relating to both tasks lists.

The Board has considered the record as a whole and finds that the ALJ's Award should be modified. The Board affirms the ALJ's conclusion that claimant failed to demonstrate the "good faith" necessary under *Foulk*. But, the Board finds that a full time wage based upon claimant's present wage rate of $7.00 per hour, or $280 per week, should be imputed. Although the ALJ imputed the part-time wage claimant was making at the time she left respondent's employ, she is clearly capable of earning more. Thus, the ALJ's Award is modified to reflect an imputed wage of $280 per week, which when compared to the pre-injury wage, reflects a 13 percent wage loss.

Although the respondent suggested that the full-time wage of an activity director, which theoretically exceeds her pre-injury wage, was the more appropriate wage to impute to claimant, the Board disagrees under the facts of this case. The job of activity director in respondent's facility was not a full-time job unless and until the census was increased. While there may be other facilities where the job was available to an applicant on a full-time basis, there is no evidence within the record to establish that fact. Thus, the Board is unwilling to impute the wage of a full-time activity director for respondent.

Turning to the task loss component, the Board notes claimant's own brief requests the Board affirm the ALJ's finding of a 25.5 percent task loss.[6] But at oral argument, claimant's counsel argued that the task loss component should be examined. The Board has considered the physicians' opinions and finds that claimant sustained a 35 percent task loss, which is nothing more than an average of the highest and lowest opinions expressed by each physician. The Board finds credible the tasks lists prepared by both vocational experts as well as both physicians opinions. Under these circumstances a split of opinions is appropriate.

The Board therefore finds that the Award should be modified to reflect a 35 percent task loss and a 13 percent wage loss. When the two are averaged, claimant is found to have sustained a 24 percent work disability.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

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[5] ALJ Award (July 13, 2004) at 4.

[6] Claimant's Brief (filed September 29, 2004) at 4.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated July 23, 2004, is modified as follows:

The claimant is entitled to 10.42 weeks of temporary total disability compensation at the rate of $186.68 per week or $1,945.21 followed by 49.8 weeks of permanent partial disability compensation at the rate of $186.68 per week or $9,296.66 for a 12% functional disability followed by 49.8 weeks of permanent partial disability compensation at the rate of $186.68 per week or $9,296.66 for a 24% work disability, making a total award of $20,538.53.

As of November 16, 2004 there would be due and owing to the claimant 10.42 weeks of temporary total disability compensation at the rate of $186.68 per week in the sum of $1,945.21 plus permanent partial disability compensation at the rate of $186.68 per week in the sum of $18,593.32 for a total due and owing of $20,538.53, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of November 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director